

O

JS - 6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

UNIMAX EXPRESS, INC.,	)	Case No. CV 11-02957 DDP (FMOx)
	)	
Plaintiff,	)	
	)	<b>ORDER GRANTING DEFENDANT'S MOTION</b>
v.	)	<b>TO DISMISS FOR LACK OF SUBJECT</b>
	)	<b>MATTER JURISDICTION</b>
EVERGREEN SHIPPING AGENCY,	)	
	)	
Defendant.	)	[Docket No. 20]
	)	

Presently before the court is Defendant Evergreen Shipping Agency ("Evergreen")'s Motion to Dismiss Plaintiff's complaint. Because the court determines that subject matter jurisdiction is lacking, the court grants the motion and adopts the following order.

**I. Background**

Evergreen, a shipping company, contracts with trucking companies such as Plaintiff for the overland transport of cargo containers. When truckers do not return containers on time, Evergreen charges late fees.<sup>1</sup> The parties enter into a standard

---

<sup>1</sup> The parties refer to these fees as "per diem" charges. Evergreen does not charge late pick-up, or "demurrage" fees. (Declaration of Dominic C. Obrigkeit in Support of Defendant's (continued...)

1 contract, the Uniform Intermodal Interchange and Facilities Access  
 2 Agreement ("the Agreement"). The Agreement contains an arbitration  
 3 provision that applies to billing disputes.<sup>2</sup> Plaintiff filed suit  
 4 in this court, alleging that Evergreen improperly charged plaintiff  
 5 late return fees on weekends and holidays. Evergreen now moves to  
 6 dismiss the complaint for lack of subject matter jurisdiction.<sup>3</sup>

## 7 **II. Discussion**

8 Plaintiff filed suit in this court on the basis of diversity  
 9 jurisdiction. (Complaint ¶ 13.) This court has jurisdiction over  
 10 civil actions between diverse parties where the amount in  
 11 controversy exceeds \$75,000. 28 U.S.C. § 1332(a). A party may  
 12 raise a jurisdictional challenge under Federal Rule of Civil  
 13 Procedure 12(b)(1) either on the face of the pleadings or with  
 14 reference to extrinsic evidence. Warren v. Fox Family Worldwide,  
 15 Inc., 38 F.3d 1136, 1139 (9th Cir. 2003). Where subject matter  
 16 jurisdiction is challenged, the party asserting jurisdiction bears  
 17 the burden of proving its existence. Robinson v. United States, 58  
 18 F.3d 683.

19 Here, Evergreen has presented evidence that the total amount  
 20 of late fees billed to Plaintiff was \$18,186. (Declaration of  
 21 Dominic C. Obrigkeit in Support of Defendant's Motion to Dismiss ¶

---

23 <sup>1</sup>(...continued)  
 24 Motion to Dismiss ¶ 10.)

25 <sup>2</sup> In a related case, this court found the arbitration  
 26 provision unconscionable and unenforceable. See Unimax Express,  
Inc. v. Cosco North Am., Inc., No. CV 11-02947 DDP, 2011 WL 5909881  
 at \*3-4 (C.D. Cal. November 28, 2011).

27 <sup>3</sup> Because the court agrees with Evergreen that subject matter  
 28 jurisdiction is lacking, the court does not address Evergreen's  
 other arguments in support of the motion to dismiss.

1 11.) This amount is insufficient to confer jurisdiction under 28  
2 U.S.C. § 1332(a).

3 Though not pled in the complaint, Plaintiff's opposition to  
4 the instant motion suggests that this court has jurisdiction under  
5 the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). Under  
6 CAFA, this court has original jurisdiction over class actions in  
7 which the parties are minimally diverse and in which the amount in  
8 controversy exceeds \$5 million. 28 U.S.C. § 1332(d). The  
9 complaint, however, makes no mention of CAFA and makes no  
10 suggestion that the amount in controversy exceeds the  
11 jurisdictional minimum.

12 Nor has Plaintiff provided any extrinsic evidence that the \$5  
13 million minimum is met. To the contrary, Evergreen has submitted  
14 evidence that it charged all motor carriers, including Plaintiff, a  
15 total of \$8,862,453.66 in late fees incurred on all days of the  
16 week. (Obrigkeit Dec. ¶¶ 12-13.) Furthermore, Evergreen presented  
17 evidence that it never collected late fees on weekends or holidays  
18 in Oakland, and did not collect such fees in Los Angeles or Long  
19 Beach between April 2007 and June 2011. (Id. ¶ 13-14.)

20 Apparently recognizing that it has not met its burden of  
21 proving subject matter jurisdiction, Plaintiff has requested  
22 jurisdictional discovery. (Opp. at 19-20.) Plaintiff argues that  
23 such discovery is necessary because the parameters of Evergreen's  
24 electronic database are unknown. (Opp. at 20.) It does not appear  
25 to the court, however, that there is any reasonable probability  
26 that Plaintiff would be able to establish CAFA jurisdiction if  
27 discovery were allowed. See Laub v. Dep't of Interior, 342 F.3d

28

1 1080, 1093 (9th Cir. 2003). Accordingly, Plaintiff's request is  
2 denied.

3 **III. Conclusion**

4 For the reasons stated above, Defendant's Motion to Dismiss is  
5 GRANTED.

6  
7  
8 IT IS SO ORDERED.

9  
10  
11 Dated: May 23, 2012



DEAN D. PREGERSON  
United States District Judge